DATE ISSUED: November 29, 1996

CASE NO: 94-OFC-1

In the Matter Of

U.S. DEPARTMENT OF LABOR,
OFFICE OF FEDERAL CONTRACT
COMPLIANCE PROGRAMS,

Plaintiff,

v.

UNITED AIRLINES, INC.,

Defendant,

and

AIR LINE PILOTS ASSOCIATION, INTERNATIONAL,

Intervening Party-in-Interest.

APPEARANCES:

Dolores A. Sullivan, Esquire
Belinda Reed Shannon, Esquire
Consuela Pinto, Esquire
U.S. Department of Labor
Office of the Solicitor
200 Constitution Avenue, N.W.
Washington, D.C. 20210
For the Plaintiff

Peter W. Zinober, Esquire
Zinober & McCrea
201 E. Kennedy Boulevard, Suite 1750
Tampa, Florida 33602
For the Defendant

Marian C. Haney, Esquire
Mayer, Brown & Platt
190 S. La Salle Street
Chicago, Illinois 60603
For the Defendant

Russell Hollander, Esquire
Cohen, Weiss & Simon
330 W. 42nd Street
New York, NY 10036
For the Intervening Party-in-Interest

BEFORE: DONALD W. MOSSER
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

This proceeding arises under Section 503 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 793 (the Act) and the regulations promulgated thereunder, 41 C.F.R. Part 60. Plaintiff, Office of Federal Contract Compliance Programs, (OFCCP), filed an administrative complaint on October 8, 1993 against United Airlines, Inc. (United). OFCCP alleges in the complaint that United violated Section 503 of the Act by refusing to employ a qualified individual with disabilities, Paul Pyles, because of his disabilities.

United filed a motion for summary judgment on June 1, 1995, principally arguing that Mr. Pyles was not a qualified individual with disabilities within the meaning of Section 503 of the Act. Plaintiff opposed the granting of the motion and a hearing on the motion was held on June 20, 1995 at Chicago, Illinois. I denied United's motion for summary judgment on July 20, 1995 because I believed factual questions remained in controversy. By Order dated August 17, 1995, I allowed the Airline Pilot's Association, International (ALPA), to intervene, on a limited basis, pursuant to 41 C.F.R. § 60-30.24.

A formal hearing on the merits was held on September 11-13, 1995 at Chicago, Illinois. Counsel for OFCCP and United filed post-hearing original and reply briefs. The following findings of fact and conclusions of law are based on a comprehensive review of both the evidentiary record and the briefs of the parties.[1]

[1]References in this decision to ALJX, PX and DX pertain to the exhibits of the Administrative Law Judge, Plaintiff and Defendant, respectively. The transcript of the September 11-13, 1995 hearing is cited as Tr. and by page number.

ISSUES

The principal issues remaining in controversy are:

1. whether Paul Pyles is a qualified individual with disabilities within the meaning of Section 503 of the Act; and, if so,

2. whether United's refusal to employ Mr. Pyles was discriminatory under the Act or was consistent with business necessity and safety; and,

3. the extent of damages to be assessed against United because of its violation of Section 503 of the Act.

Also remaining to be resolved are questions relating to sanctions sought by both the Plaintiff and Defendant against each other on discovery matters.

FINDINGS OF FACT

United is a commercial airline carrier incorporated under the laws of the State of Delaware with its principal place of business in Chicago, Illinois. During the time pertinent to this case, United had 50 or more employees and maintained contracts or subcontracts with the federal government in excess of $10,000. Under contracts/subcontracts with the U.S. Postal Service, United was required to transport mail as requested by that postal service on any flight in the contractor's air transportation system. (Tr. 593-594).

Defendant's contract with ALPA provides for various "pilot" positions. A captain is the pilot in command of the aircraft and its crew members who is primarily responsible for the control or manipulation of the aircraft, particularly on take-off and landing. A first officer is the second pilot in command whose principal duty is to assist or relieve the captain in the control of the aircraft but is also responsible for the inspection of the aircraft where there are only two pilots assigned to a flight. The third pilot generally in command is the second officer whose duties generally include assisting the captain and first officer on the analysis, operation and monitoring of the mechanical and electrical systems of the aircraft, as well as making pre-flight inspections of the aircraft. A captain, first officer and second officer must hold an effective airman's certificate authorized for the respective position. (DX 6, 42; Tr. 70-71).

The Federal Aviation Administration of the United States Department of Transportation (FAA) is the federal agency responsible for regulating the use of the navigable airspace in the United States. In addition to meeting certain requirements relating to licensing and age, the FAA requires airline transport pilots, including captains and first officers, to hold a valid first class medical certificate. Commercial pilots, flight engineers and flight navigators, such as United's second officers, are required by the FAA to have a second class medical certificate. A second class medical certificate is valid for 12 months, while a first class medical certificate is valid for 6 months or an additional 12 months for activities requiring a second class medical certificate. (Tr. 599; PX 22, 69; DX 96).

Pertinent to this case, the FAA requires an applicant for a first or second class certificate to meet certain vision requirements. (PX 22, 69; DX 96). Specifically, the applicant must have distant visual acuity of 20/20 or better in each eye without correction or at least 20/100 in each

eye corrected to 20/20 or better with corrective lenses (glasses or contact lenses).[2] A person with 20/20 distant visual acuity would see an object 20 feet away as a "normal" person would see it, while a person with 20/100 vision would see at 20 feet what an normal person would see at 100 feet. (DX 28, p. 22). A person with uncorrected distant visual acuity of 20/40 or better generally can read, drive and function normally. (DX 28, p. 23). A myopic or "nearsighted" person has difficulty with distant vision because of the inability of that person's eyes to focus sharply on objects at long distances. (DX 28, p. 3).

United's pertinent medical policies with respect to its pilots is essentially consistent with the FAA vision requirements. (DX 26, p. 3). It requires its pilots to have distant visual acuity of 20/20 in each eye without correction, but it also hires pilots with myopia having uncorrected distant visual acuity of at least 20/100 corrected to 20/22 with glasses or contact lens. (DX 26; Tr. 421, 459). Beginning in 1984 or 1985, however, United implemented an unwritten policy of not hiring pilots who had undergone radial keratotomy surgery (RK), which is a surgical procedure on the cornea of the eye that is intended to reduce or correct myopia. (Tr. 170, 409, 413; PX 28, p. 18; DX 109, p. 680).

United's Corporate Medical Director is a physician certified by the FAA as an aviation medical examiner. (Tr. 367). He is responsible for determining and implementing United's medical policy. (Tr. 366-367, 407). After considering pertinent medical literature and consulting with a number of opthalmologists, this physician implemented United's RK policy for new-hire pilots because he was particularly concerned with reported complications of glare and visual instability following the surgical procedure. (Tr. 384, 409-413). In 1993, United changed its policy pertaining to hiring pilots who had undergone RK. It adopted a written policy which required new-hire pilots with a history of RK to meet minimum criteria. (PX 29; DX 16). This change was implemented after United's corporate medical director determined that the preponderance of medical literature permitted the company to look at cases regarding RK on a case-by-case basis without compromising air safety. (PX 29, 30; DX 16, 17, 32, 33, 59, 62, 63, 65, 69, 83-87, 92; Tr. 157-158, 200-202, 400-401, 421-429).

Between March 1987 and March 1994, approximately 3500 applications for pilot positions were processed through United's regional medical facility at Denver, Colorado. Thirty-five to forty applicants were rejected for pilot positions because of RK. (Tr. 148). No applicant with a history of RK was accepted by United for a pilot position during this time period. (Tr. 173).

Defendant never had a policy regarding incumbent pilots who had undergone RK. (Tr. 141-146, 413). When it was discovered that some of United's incumbent pilots had undergone RK, the company's medical director decided to consider the matter on a case-by-case basis. (Tr. 172). One such pilot was removed from flight status by United's medical director when it was learned that the pilot had RK some 18 months earlier in 1985. (Tr. 150-153, 178-179, 392, 394-395, 416-417; PX 37-44). Another pilot, who had worked with United since 1978, was found in 1988 to have undergone RK while on furlough in 1981. United's medical director decided to let this pilot continue to fly because he believed she had demonstrated that she was able to safely operate United's airplanes over an extensive period of time following her RK. (Tr. 155-156, 174-177, 395, 414-416; PX 73, pp. 27, 80-82, 106, 115-116, 118). For the same reason, United allowed a third pilot, who had undergone RK in 1980 and was hired in 1985, to continue to fly when his history of RK was discovered in 1991. (Tr. 154, 178-182, 396-397, 414, 416-417, 431-

[2]The controlling regulation also provides requirements for near vision with or without corrective glasses. (PX 22, 69). 14 C.F.R. § 67.13(b).

433; PX 74, pp. 30, 66-67, 88-90, 94, 100-102). United's medical staff required the incumbent pilots with a history of RK to annually submit records of the pilots' ophthalmologists for review. (PX 34-36).

Paul Pyles, born October 3, 1933, began flying as a commercial airline pilot for Pan American Airways (Pan Am) in 1966. He held a first class medical certificate as required by the FAA. After working for about a year as a second officer with Pan Am, he became a first officer and remained working in that capacity until 1975. Pan Am placed Mr. Pyles on disability leave in that year because his myopic condition prevented him from meeting the FAA's distant visual acuity requirement of having vision correctable to 20/20 with glasses or contact lens. (Tr. 26-27, 30-33, 70-72, 598).

While on disability leave from Pan Am, Mr. Pyles worked as a marketing manager for Caribe Aviation from 1975 to 1983, then was self-employed as an aviation consultant until 1986. (Tr. 73, 115-116). His myopic condition progressively deteriorated during this time to such an extent that he was unable to function without glasses with strong lenses. Mr. Pyles' uncorrected distant visual acuity was assessed in 1986 as approximately 20/400 in each eye. (Tr. 32-35, 600). Radial keratotomy surgery was successfully performed on Mr. Pyles' eyes in early 1986, and the FAA issued him a first class medical certificate later in that year. He was re-employed as a first officer with Pan Am in October of 1986 and continued to fly in that capacity with Pan Am until December of 1991. (Tr. 38-42, 79, 598).

United entered into a contract with Pan Am in 1990 to purchase some of Pan Am's flight routes. (PX 4). In this contract, United pertinently agreed to offer employment to some of the pilots assigned to these routes by Pan Am with the requirement that the pilots satisfy United's normal hiring standards including a medical examination. (PX 4). United and ALPA separately agreed in the following year that pilots, who were eligible to transfer their employment from Pan Am to United and were selected, would pass a United pilot physical examination and satisfy all of United's normal pilot hiring criteria. (PX 5, 58, 65). The pilots hired by United would then be entitled to certain benefits and compensation rights, including seniority, based in part on their length of employment with Pan Am. (PX 5, 63; DX 11, 49; Tr. 323-24, 332-336, 341, 603).

Between April 1991 and September 1992, forty-two of Pan Am's pilots were found to be eligible for employment by United under the purchase agreement and several of them subsequently were merged into United's seniority list pursuant to an ALPA arbitration award. (Tr. 323, 332-35, 601; PX 51; DX 38, 49). All of these pilots worked on flights covered by United's contracts/subcontracts with the U.S. Postal Service. (Tr. 596). Paul Pyles is one of the pilots who was eligible to seek employment with United under the Defendant's purchase agreement with Pan Am. (Tr. 43, 48; PX 7, 65).

By letter dated March 18, 1991, Mr. Pyles was advised by a flight manager of United, who was assigned to train and process the Pan Am pilots, to report to United's flight center in Denver, Colorado on April 1, 1991 for the first phase of training. (DX 7, 65). This four day phase was to include a standard United pilot physical examination and the receipt of training packages. The second phase of this training was to involve a home study course of United's training materials while United reviewed the pilot's training and personnel records at Pan Am. The applicants who were to enter phase three of the training program were to be considered employees of United and were to undergo a more extensive five-day training program comparable to United's recurrent training programs for all of its pilots. (PX 7, 65; Tr. 48-49).

Mr. Pyles and several other Pan Am pilots reported to United's flight center at Denver as directed. He initially completed a medical evaluation form (PX 8), underwent a physical

examination and attended various briefings. On the following day, he received his training materials and attended more briefings, then he and some other pilots were requested to return to United's medical department for various reasons. He met with United's regional flight surgeon who advised him that Mr. Pyles' transfer of employment to United was being denied because of the pilot's RK history. (Tr. 42-56, 160-165). The regional flight surgeon became aware of the pilot's surgery by reviewing Mr. Pyles' medical evaluation form. (Tr. 164, 167-168; PX 8; DX 27). Mr. Pyles requested a letter of the regional flight surgeon indicating that United was denying his transfer because of that company's RK policy. (Tr. 167-168). By letter dated April 8, 1991, United's regional flight surgeon did advise Mr. Pyles that the pilot was "not found to be qualified as a flight officer due to the presence of bilateral radial keratotomy scars." (DX 25; Tr. 165).

Paul Pyles filed a complaint with OFCCP on July 15, 1991 alleging United discriminated against him by refusing employment because of his medical handicap which he described as "scars" resulting from radial keratotomy surgery. (PX 10). OFCCP investigated the complaint and unsuccessfully attempted to resolve the matter with United through conciliation. (PX 11-21). Plaintiff then instituted this action by filing an administrative complaint against United on October 8, 1993.

Conclusions of Law

Qualified Individual With Disabilities

Section 503 of the Rehabilitation Act prohibits discrimination in the employment of qualified disabled individuals by Federal government contractors/subcontractors.[3] 29 U.S.C. § 793. OFCCP initially alleges that Paul Pyles is a qualified disabled individual. Secondly, it complains that United discriminated against Mr. Pyles by failing to employ him as a pilot because of his disability. OFCCP therefore maintains that the Defendant is liable for relief to Mr. Pyles, and that United essentially should be ordered to refrain from further discrimination against other such qualified disabled persons. United naturally disagrees with all of the positions of OFCCP. My conclusions on these issues are foreshadowed by the void in the findings of fact with respect to the secondary positions of the Plaintiff.

Initially, I should note that jurisdiction of the Act is not in question in this case. The parties stipulated to facts supporting this conclusion. (Tr. 594-596). At all times pertinent to this case, United held contracts or subcontracts with the U.S. Postal Service in excess of $2,500 and it had more than 50 employees. Moreover, all of the pilots hired by United under its contract with Pan Am worked on routes covered by the Defendant's government contracts. Mr. Pyles also would have worked on these routes, if United had not rejected his employment in 1991. *See* 29 U.S.C. § 793(a); 41 C.F.R. §§ 60-741.1, 60-741.3.

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[3]The Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, 106 Stat. 4344 (Oct. 29, 1992), amended the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-797b, substituting the term "individuals with disabilities" for "individuals with handicaps." Title I of the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12117 (1994) also addresses "disabilities" which "represents an effort by [Congress] to make use of up-to-date, currently accepted terminology." S. Rep. No. 116, 101st Cong., 1st Sess. 21 (1989); H.R. Rep. No. 485 pt. 1, 101st Cong., 2d Sess. 50-51 (1990). The revision does not reflect a change in definition or substance. *Id.* The Rehabilitation Act states that complaints filed under Section 503 and under the Americans with Disabilities Act should be "dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards.
. . ." 29 U.S.C. § 793(e). *See* 42 U.S.C. § 12117(b).

The initial question to address is whether OFCCP has established a prima facie case that Mr. Pyles should be considered a qualified disabled individual for purposes of this case. The Act, as amended, defines an "individual with a disability" as any person who:

(i) has a physical or mental impairment which substantially limits one or more of such person's major life activities,
(ii) has a record of such an impairment, or
(iii) is regarded as having such an impairment.

29 U.S.C. § 706(8)(B); *see also* 41 C.F.R. § 60-741.2.

OFCCP contends that the latter two provisions of the above-quoted statute are applicable to this case because Paul Pyles has a record of an impairment which substantially limited his major life activities and United regarded him as having such an impairment. Interestingly, the Plaintiff initially argues that myopia is the impairment which substantially limited Mr. Pyles' major life activities in the past. On the other hand, OFCCP maintains that the radial keratotomy which the pilot sought to correct his myopic condition is what United regards as Mr. Pyles' substantially limiting impairment.

Obviously, I initially must seek an understanding of the term "impairment" as used in Section 503 of the Act to resolve the questions presented. The regulations pertaining to Section 503 do not contain a definition of impairment. However, this term was defined in *E.E. Black Ltd. v. Marshall*, 497 F. Supp. 1088, 1097 (D. Haw. 1980), *vacated and remanded to administrative law judge for further findings*, 26 Fair Empl. Prac. Cas. (BNA) 1183 (D. Haw. 1981), as "any condition which weakens, diminishes, restricts, or otherwise damages an individual's health or physical or mental activity." Also, the regulations promulgated by the Equal Employment Opportunity Commission under the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.*, which statute prohibits discrimination against qualified individuals by private employers and state/local governmental employers, defines "physical impairment" as "[a]ny physiological disorder, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine." 29 C.F.R. § 1630.2(h)(1).

Plaintiff argues that myopia has been held to be an impairment under the Act, citing *Padilla v. City of Topeka*, 798 P.2d 543 (Kan. 1985). As correctly noted by Defendant's counsel, however, that finding is of little guidance since the record in that case was held to contain no evidence that the myopia substantially limited a major life activity of that plaintiff. In a recent recommended decision of an administrative law judge of the U.S. Department of Labor, OFCCP's position that myopia is an impairment within the meaning of the Act was rejected because the judge considered the condition to be more of a physical characteristic or relatively common condition that is widely shared by the populous and therefore not intended to be covered by the Act. *OFCCP v. Delta Airlines, Inc.*, Case No. 94-OFC-8 (1996) (Recommended Decision and Order). Plaintiff argues that the fact a disorder is widely shared by the general public is not controlling on the question of whether the condition is an impairment under the Act. *OFCCP v. Washington Metropolitan Area Transit Authority (WMATA)*, 84-OFC-8 (1989) (Assistant Secretary of Labor Final Decision and Remand Order), *rev'd on other grounds sub nom. Washington Metropolitan Area Transit Authority*, 55 Empl. Prac. Dec. (CCH) ¶ 40,507 (D.D.C. 1991). OFCCP further contends in its reply brief that I should not consider the recommended decision in the *Delta Airlines* case because it is overbroad, ignores applicable Section 503 law and is not binding since it has not been approved by the Secretary of Labor. Moreover, the Plaintiff maintains in its reply brief that I should ignore many of the decisions cited by United because the

cases do not involve fact patterns comparable to this case, they were brought under statutes other than Section 503 of the Act, and none of the courts applied legal standards adopted by the Assistant Secretary of Labor for Section 503 cases. This latter position is surprising since OFCCP pointed out in a footnote in its original brief that the Equal Employment Opportunity Commission had issued regulations and other information with respect to the Americans with Disabilities Act that may be considered for guidance in construing Section 503 of the Act.

I am cognizant that the recommended decision in *Delta Airlines, Inc.,* as well as the cases cited by United under the Americans with Disabilities Act, are not binding precedent. I find, however, that there is no case law from the Secretary of Labor which I consider to be clearly on point with the facts involved in this case. Therefore, I would be remiss in my responsibilities if I did not study the wisdom of other triers-of-fact, whom have considered factual situations and statutes comparable to the ones involved in this case. I take this same position with respect to the regulations promulgated under the Americans with Disabilities Act.

In returning to the primary focus of this discussion, I agree with OFCCP that myopia in certain situations can be considered an impairment. The court in *Sutton, et. al. v. United Airlines, Inc.*, No. 96-S-121, 1996 U.S. Dist. LEXIS 15106 (D. Colo. August 28, 1996), acknowledged as much in a case involving the Americans with Disabilities Act. It indicated that "[o]bviously, the Plaintiffs' ability to see without correction is affected, but, as reflected in the statute and regulations, far more is required to trigger coverage under" that statute, alluding to the requirement that the impairment must substantially limit an individual's major life activities.

I believe the degree to which a person is affected by myopia or the extent to which the condition is correctable is the controlling factor. OFCCP notes that case law of the Secretary of Labor holds that a disability must be viewed in its uncorrected state. *See OFCCP v. Commonwealth Aluminum,* 82-OFC-26 (1994) (Ass't Sec'y of Labor Final Decision and Order), *stayed sub nom. Commonwealth Aluminum v. U.S.*, Case No. 94-0071-00(C) (W.D. Ky. 1994). I find this is an illogical approach for myopia because, as the court noted in the *Sutton* case, "numerous federal courts have concluded that the need for corrective eyewear is commonplace and does not substantially limit major life activities", citing a whole series of supporting cases.

Obviously, myopia and even hyperopia (farsightedness) affect a large portion of the general public, but cause negligible visual difficulty because of easy access to corrective eyewear. Without enumerating, I believe it is reasonable to say that most of the attorneys and witnesses who appeared at the formal hearing use some form of eyewear to correct a vision irregularity. Thus, I find that the extent to which a myopic condition is correctable is the important factor to consider and this leads to the next question of whether the myopia in its corrected state substantially limits a person's major life activities.

I find that Paul Pyles' myopic condition between 1975 and 1986 was an impairment because it was not correctable to 20/20 and thereby deprived him of the opportunity to continue flying as a commercial airline pilot under the guidelines of the FAA. Indeed, his nearsightedness continued to deteriorate over this period of time to such an extent that his uncorrected distant vision was approximately 20/400 and he was forced to wear strong corrective eyewear to function. The critical question, however, is whether his impairment constitutes a qualified disability under Section 503 of the Act because it substantially limited his major life activities.

The regulations promulgated under the Act provide some guidance as to the meaning of "major life activities." Appendix A to 41 C.F.R. Part 60-741 provides the "*life activities"* include "communication, ambulation, selfcare, socialization, education, vocational training, employment, transportation, adapting to housing, etc." OFCCP initially argues in this regard that Paul Pyles'

myopia substantially limited him in the past because it caused him to lose his job with Pan Am in 1975 and precluded his employment as an airline pilot for eleven years. Plaintiff stresses that the primary focus under this aspect of Section 503 is the extent to which a person's life activities relating to employment is affected by an impairment. This is in accord with the pertinent regulations which in part explain that "[a] handicapped individual who is likely to experience difficulty in securing, retaining or advancing in employment would be considered substantially limited" under Section 503 of the Act. 41 C.F.R. Part 60-741, Appendix A.

The court in *E.E. Black v. Marshall,* 497 F. Supp. 1088, 1099-1100 (D. Haw. 1980), held that an impairment that interfered with a person's ability to perform a specific job, but did not significantly reduce that person's ability to obtain satisfactory employment, was not substantially limiting under the Act. It emphasized the necessity to examine such a question on a case-by-case approach to determine if the impairment "of a rejected, qualified job seeker, constitutes, for that individual, a substantial handicap to employment." *Id.* at 1100. That court went on to enumerate various factors which are relevant in determining whether an individual's impairment substantially limited that person's employment opportunities such as the number and type of jobs from which the individual was disqualified, the geographical area to which the person had reasonable access to secure employment and the individual's job expectations and training. *Id.* at 1100-01; *see Welsh v. City of Tulsa,* 977 F.2d 1415, 1419 (10th Cir. 1992); *Jasany v. U.S. Postal Service,* 755 F.2d 1244, 1249 (6th Cir. 1985).

OFCCP has the burden of establishing a prima facie case that Mr. Pyles' past impairment substantially limited his major life activities. *See Id.* at 1249-50. I find that it has not met this burden with respect to establishing the extent to which Mr. Pyles' myopia affected his employment potential other than that it precluded his employment as a commercial airline pilot because he could not obtain the required medical certificate from the FAA. Paul Pyles' training and skills obviously afforded him other employment opportunities which OFCCP conveniently ignored. Indeed, the limited evidence in this regard does prove that the former airline pilot was employed as a marketing manager in the airline industry and as an aviation consultant while on disability leave from Pan Am. Little evidence was offered to prove the number and types of jobs from which Mr. Pyles was disqualified while on disability leave. The same is true concerning the geographical area to which Mr. Pyles had access to obtain employment within the parameters of his skills and training. I therefore find that the evidence offered by the Plaintiff on this question does not meet the standards set forth in the *Black* case or the more recent cases of the Federal circuit courts.

The position taken by OFCCP that Paul Pyles was substantially limited in his major life activities from 1975 to 1986 because his myopia precluded his employment as a commercial airline pilot makes little sense. If this were true, then every pilot who is grounded because myopia prevents the pilot from retaining the required FAA certification could file a complaint alleging discrimination by the pilot's employer under Section 503 or a comparable statute. I reiterate that the pertinent regulation indicates that "[a] handicapped individual who is likely to experience difficulty in ... retaining ... employment" because of the person's impairment would be considered substantially limited under Section 503 of the Act. 41 C.F.R. Part 60-741, Appendix A. Obviously, such an approach would be inconsistent with the overall intent of the Act of protecting truly disabled persons against discrimination because of an impairment.

Plaintiff also argues that Paul Pyles' myopia substantially limited his major life activities in ways unrelated to employment. OFCCP points out that Mr. Pyles' myopia worsened to such an extent that he was unable to function without strong corrective lenses. Plaintiff goes on to contend that Mr. Pyles was legally blind in 1986 because his distance vision was 20/400 in each eye.

I acknowledged in the findings of fact that Mr. Pyles' myopic condition progressively deteriorated while he was on disability leave from Pan Am. I stress, however, that the 20/400 distance visual assessment on which OFCCP relies was factually found to be Mr. Pyles' uncorrected visual acuity. The record contains little evidence as to Mr. Pyles' corrected distant visual acuity during this period of time other than that it was less than the 20/20 required by FAA to retain his commercial pilot's certification. I find that evidence as to Mr. Pyles' uncorrected vision during his disability leave, alone, is not material to the question of whether his impairment substantially limited his major life activities. Again, I stress it is the extent to which one is impaired by his or her corrected vision that should be controlling on the question of whether such an impairment substantially limits a person's activities.

I reiterate that the court in *Sutton, et. al. v. United Airlines, Inc.*, No. 96-S-121, 1996 U.S. Dist. LEXIS 15106 (D. Colo. August 28, 1996), instructed that "numerous federal courts have concluded that the need for corrective eyewear is commonplace and does not substantially limit major life activities." It cited a series of supporting case law case, pertinently including *Chandler v. City of Dallas*, 2 F.3d 1385, 1390 (5th Cir. 1993), *reh'g denied*, 9 F.3d 105 (1993), *cert. denied*, 114 S.Ct. 1386 (1994) (vision correctable to 20/200 is not a handicap under the Act); *Jasany v. U.S. Postal Service*, 755 F.2d 1244, 1248-50 (6th Cir. 1985) (plaintiff with crossed eyes who had difficulty operating mail-sorting machine but who otherwise was not limited to work or recreation was not handicapped under the Act); *Venclauskas v. Connecticut Dept. of Pub. Safety*, 921 F. Supp. 78, 80-82 (D. Conn. 1995) (applicant for state police trooper trainee who was rejected for failure to meet unaided visual acuity standard failed to state a claim under the Act and the Americans with Disabilities Act); *Joyce v. Suffolk County*, 911 F. Supp. 92, 96 (E.D.N.Y. 1996) (candidate for county police officer position who failed to meet visual acuity standard because his uncorrected vision in each eye was 20/200 but his corrected vision in each eye was 20/20 was not disabled under the Act or the Americans with Disabilities Act); *Walker v. Aberdeen-Monroe County Hospital*, 838 F. Supp. 285, 288 (N.D. Miss. 1993) (a person whose vision is corrected to 20/30 is not handicapped within the meaning of the Act); *Sweet v. Electronic Data Systems, Inc.*, 1996 WL 204471, 5 A.D. Cases 853 (S.D.N.Y. April 26, 1996) (plaintiff's diminished vision in one eye did not qualify as a disability because it did not substantially limit his ability to participate in any major life activity). As also stated by the court in the *Sutton* case, "[e]ven accepting all of the Plaintiffs' allegations as true" with respect to Mr. Pyles' uncorrected distant visual acuity, I find that OFCCP has not met its burden of proving that Mr. Pyles was substantially limited in the major life activity of seeing while he was on disability leave from Pan Am.

Assuming *arguendo* that OFCCP established that Mr. Pyles' past uncorrected myopia constituted an impairment which substantially limited his major life activities, United did not reject him for employment because of his past history of myopia. United did not hire Paul Pyles in 1991 because it had a policy of not hiring individuals for pilot positions who had undergone radial keratotomy. This policy was adopted for safety reasons after United's corporate medical director had discussed the effects of RK with opthalmologists and had considered pertinent medical literature. Regardless of the position advanced by OFCCP, United's reason for rejecting Mr. Pyles for employment as a pilot related to the existing safety questions surrounding radial keratotomy and was not due to Mr. Pyles' history of myopia.[4]

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[4]The Pan Am pilots who were considered for employment by United, as well as Mr. Pyles, were new-hire employees rather than transferees or incumbents. The contract between Pan Am and the Defendant and the separate agreement with ALPA made it clear that these pilots were required to meet United's normal hiring standards.

I next turn to OFCCP's secondary position that United regarded Paul Pyles as having an impairment which substantially limited his major life activities when it rejected him for employment as a commercial airline pilot in 1991 due to his radial keratotomy. Actually, this was the basis of Mr. Pyles' complaint to OFCCP. It also appeared to be the principal position of the Plaintiff until United filed a motion for summary judgment regarding that position which was denied because of unresolved factual questions.

Unquestionably, Mr. Pyles' RK does not constitute an impairment under the Act. Indeed, the surgical procedure on the cornea of the eye is intended to reduce or correct myopia, the very condition which OFCCP alleges was the source of the former pilot's past disability. The surgery was successful since Mr. Pyles' distant visual acuity improved to such an extent that he was able to obtain a first class medical certificate from the FAA and resume his employment as a commercial airline pilot with his former employer.

Plaintiff does not maintain that Mr. Pyles' RK disabled him but that United regarded him as impaired because of the surgery. It explains that the Defendant "views RK corneas as weakened, diminished, restricted or otherwise damaged" because of United's belief that the surgery causes side effects such as glare and fluctuating vision. OFCCP goes on to essentially argue that United believes that these side effects impair vision to such an extent that it has adopted a policy that automatically disqualifies from flight officer employment all persons with a history of RK. Thus, Plaintiff contends that this perception of impairment substantially limits or handicaps Paul Pyles' employment, again citing *E.E. Black Ltd. v. Marshall,* 497 F. Supp. 1088, 1097 (D. Haw. 1980).

United's position on this issue is simple. It contends that there is no evidence in the record proving the Defendant regarded Mr. Pyles as impaired or disabled because of his RK. United strongly relies on the testimony of its corporate medical director who sets the company's medical policy. It also relies on the case law in essentially arguing that disqualification from one job because of a medical condition does not automatically constitute a substantial limitation on that person's ability to obtain satisfactory employment. *See Bauer v. Republic Airlines, Inc.*, 442 N.W. 2d 818, 822 (Minn. App. 1989); *see also Chandler v. City of Dallas,* 2 F.3d 1385, 1393 (5th Cir. 1993).

Although the decision in the *Black* case did provide useful criteria for determining whether a person's impairment substantially limits the individual's life activities relating to employment, OFCCP's reliance on part of that decision is misplaced. Plaintiff quotes that portion of the decision at which the court explains:

> [T]he focus cannot be on simply the job criteria or qualifications used by the individual employer; those criteria or qualifications must be assumed to be in use generally. The reason for this is that an employer with some aberrational type of job qualification . . . that screens out impaired individuals who are capable of performing a particular job, should not be able to say: 'No one else has this job requirement, so the impairment does not constitute a substantial handicap to employment, and the applicant is not a qualified handicapped individual.' If such an approach were allowable, an employer discriminating against a qualified handicapped individual would be rewarded. . . . In evaluating whether there is a substantial handicap to employment, it must be assumed that all employers offering the same job or similar jobs would use the same requirement or screening process.

E.E. Black Ltd. v. Marshall, 497 F. Supp. at 1100. Plaintiff contends in its original brief that the law requires the assumption that all airlines impose the same policy as United regarding RK and that this disqualifies Mr. Pyles from obtaining the same or similar jobs with other airlines. Thus, OFCCP believes this demonstrates that United's policy regarding RK substantially limits Mr. Pyles' employment.

The primary case cited by OFCCP regarding the applicability of the assumption set forth in the *Black* case is *OFCCP v. WMATA*, 84-OFC-8 (1989) (Assistant Secretary of Labor Final Decision and Remand Order), *rev'd on other grounds sub nom. Washington Metropolitan Area Transit Authority*, 55 Empl. Prac. Dec. (CCH) ¶ 40,507 (D.D.C. 1991). The Assistant Secretary held in that decision that an individual who was denied a carpenter's job due to high blood pressure was regarded as handicapped. The Assistant Secretary noted that it should be assumed that similar companies would apply the same blood pressure standards as required by the analysis delineated in *Black*. The defendant did not regard the individual in the *WMATA* case as unsuited for only the particular requirements of just the carpenter's job, but that the person should not perform any heavy labor job. Thus, the individual involved in that case was handicapped under the Act regardless of the standards implemented by other employers.

More recently, courts have refined the application of the standards set forth in the *Black* case and no longer require the use of assumption quoted by OFCCP. In fact, application of the assumption has been expressly or implicitly rejected in several cases. *See Tudyman v. United Airlines*, 608 F. Supp. 739, 745, n. 6 (C.D. Cal. 1984)*; Roth v. Lutheran General Hospital*, 57 F.3d 1446, 1454 (7th Cir. 1995); *Welsh v. City of Tulsa*, 977 F.2d 1415, 1419 (10th Cir. 1992). In both the *Roth* and *Welsh* cases, the courts required an allegedly disabled person to show that other employers have the same job requirements that disqualify that individual from working rather than simply assuming that all employers did.

I also find it significant that the record in this case contradicts the assumption proposed by OFCCP. Obviously, Pan Am did not have a policy against employing pilots who had undergone RK. They allowed Mr. Pyles to return to work as a pilot in 1986 and retained him though 1991. It is indeed interesting to note that OFCCP argues that United's RK policy substantially limited Mr. Pyles when it rejected his employment in April of 1991, yet the pilot continued to work as a first officer with Pan Am until that company went out of business at the end of that year. Also, there is other evidence in the record indicating that not all commercial airlines have adopted an RK policy comparable to United's. (Tr. 82-84; DX 51). Thus, OFCCP has not shown that United's rejection of Mr. Pyles' employment as a pilot substantially limited his employment opportunities with other airlines. While it may be possible that Mr. Pyles' age may have affected other employment opportunities as a commercial airline pilot, that is not the basis of the complaint involved in this case.

OFCCP also argues that United's RK policy excluded Mr. Pyles from all flight officer positions or a "class of jobs" and therefore he should be considered disabled. Even if pilots with a history of RK were precluded from working as commercial airline pilots, it is obvious that other jobs are available considering their training and qualifications. They should have the opportunity to work in capacities such as training in the airline industry or working as a pilot with cargo or courier transportation services. A person's employment range is not limited exclusively to "a single, identical job existing among various employers in the same industry", but rather is expandable to potential employment for which an individual is qualified given his or her training, skills and past job history. *OFCCP v. Yellow Freight Systems*, 84 OFC-17 (1993) (Acting Assistant Secretary of Labor Final Decision and Order of Remand). I note in this regard that I find it interesting that the regulations promulgated under the Americans with Disabilities Act, to which OFCCP referred in its original brief as a source of guidance, provide by way of illustration that

"an individual who cannot be a commercial airline pilot because of a minor vision impairment, but who can be
. . . a pilot for a courier service, would not be substantially limited in the major life activity of working." 29 C.F.R. Appendix to Part 1630.

I agree with United that Mr. Pyles' employment rejection by that company for the position of a pilot does not mean he was disqualified for a "class of jobs" merely because United's contract with ALPA provides for several classifications of pilots. Moreover, the case law clearly indicates that "[a]n impairment that affects only a narrow range of jobs can be regarded either as not reaching a major life activity or as not substantially limiting one." *Janany v. U.S. Postal Service*, 755 F.2d 1244, 1249 n. 3 (6th Cir. 1985); *accord Heilweil v. Mount Sinai Hospital*, 32 F.3d 718, 723 (2d Cir. 1994), *cert. denied*, 115 S.Ct. 1095 (1995); *Chandler v. City of Dallas*, 2 F.3d 1385, 1392 (5th Cir. 1993). I should also note that there is no convincing evidence that Mr. Pyles was interested or sought any job with United other than that of a pilot, or more specifically, a first officer's position, although there is some evidence in the record that he is certified for other positions. (Tr. 84, 94-95). I therefore conclude that Mr. Pyles' RK disqualified him to work as a pilot for United, not a broad spectrum of jobs.

Not only is there a lack of evidence proving OFCCP's position that United regarded Paul Pyles as impaired because of his RK history, the record supports a contrary conclusion. United's corporate medical director, as well as the regional flight surgeon who advised Mr. Pyles that his employment as a pilot was being denied because of his RK history, testified that they did not consider Mr. Pyles to be disabled because of his surgery or even his past problems with myopia. (Tr. 169-171, 420). Defendant's medical director confirmed that United has pilots who are afflicted to some degree by myopia. He also acknowledged that even some of United's incumbent pilots with a history of RK were allowed to continue working in their positions because they had experienced no visual problems for a considerable period of time following their surgery. OFCCP replies that such testimony is self-serving. I agree, but I also find it credible, especially since there is no contradictory evidence in the record. I am convinced that United's corporate medical director did not consider all pilots who had undergone RK in the late 1980's and early 1990's as impaired or disabled. Rather, he was concerned with formulating a policy for his company regarding new-hire pilots which he considered at that time to be in the best interests of United and the public from a safety standpoint. I therefore find that the evidence in this record does not meet the Plaintiff's burden of proving that United regarded Mr. Pyles as impaired within the meaning of the Act because he had undergone radial keratotomy to reduce his myopia.

To summarize my conclusions on this initial issue, I find that the evidence proves that Paul Pyles' past myopia was an impairment because it was not correctable to 20/20, or to that of a normal person, and thereby deprived him of the opportunity to continue flying as a commercial airline pilot under the guidelines of the FAA. However, I conclude that OFCCP has not met its burden of proving a prima facie case that such impairment substantially limited Mr. Pyles' major life activities relating either to employment or seeing. I further conclude that the evidentiary record does not establish that United regarded Mr. Pyles as impaired or disabled when it rejected him for employment in 1991 because of his radial keratotomy history. It therefore follows that the Plaintiff has not established that Paul Pyles is a qualified disabled individual under Section 503 of the Rehabilitation Act. This ultimate conclusion renders moot the remaining issues in controversy on the merits of this case.

Sanctions

The final matters to address relate to OFCCP's and United's cross-motions for sanctions for the attorneys' fees and expenses incurred in responding to various motions. I resolved some

requests for sanctions in pre-hearing orders and they are not the subject of this discussion. However, I reserved my rulings on two requests for sanctions by both OFCCP and United until after the formal hearing to afford counsel the opportunity to respond to the motions at the hearing and to submit affidavits itemizing the costs in question.

Before I even address the matters in controversy, I should note that 41 C.F.R. § 60-741.29(b) provides that all hearings conducted under Section 503 of the Act and the regulations promulgated thereunder shall be governed by the Rules of Practice and Procedure for Administrative Proceedings set forth at 41 C.F.R. Part 60-30. Section 60-30.15(j) of 41 C.F.R., which pertains to the authority and responsibility of administrative law judges in conducting hearings under the Act, specifically provides that the judge has the power to:

> (j) Impose appropriate sanctions against any party or person failing to obey an order under these rules which may include:
> (1) Refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting it from introducing designated matters in evidence;
> (2) Excluding all testimony of an unresponsive or evasive witness, or determining that the answer of such witness, if given, would be unfavorable to the party having control over him; and
> (3) Expelling any party or person for further participation in the hearing.

41 C.F.R. § 60.30.15(j). I find it significant that neither that section of the regulations, the Rehabilitation Act, nor 29 C.F.R. § 18.29, which specifically pertains to the authority of administrative law judges of the U.S. Department of Labor, provide for the imposition of the type of sanctions requested by the parties in this case. Moreover, the Assistant Secretary of Labor has held that an administrative law judge does not have the authority to issue an order granting sanctions in the form of attorneys' fees and expenses relating to discovery matters unless such action is authorized by statute or regulations. *OFCCP v. Mississippi Power Co.*, 92-OFC-8 (July 19, 1995) (Assistant Secretary of Labor Order). *See Rex v. Ebasco Services, Inc.*, 87-ERA-6 (1994) (Secretary of Labor Final Decision and Order). Rather, an administrative law judge's authority to regulate discovery, as well as the conduct of parties and counsel, is limited to that provided in the regulations. *See* 29 C.F.R. §§ 18.29, 18.34(g)(3), 18.36.

Since the parties in this case have not requested any relief other than sanctions in the form of attorneys' fees and expenses, I must initially deny the four outstanding motions because I do not have authority under the Act or regulations to approve such sanctions. However, I believe the motions also should be denied for other reasons. First, I reiterate my ruling from the formal hearing that I deny OFCCP's request for sanctions relating to attorneys' fees and expenses incurred in the preparation of Plaintiff's opposition to Defendant's memorandum regarding the Order of July 20, 1995 and Plaintiff's response to United's proposed protective order dated July 28, 1995 because the Plaintiff did not produce evidence at the hearing to verify such expenses as was directed in the pre-hearing order dated August 7, 1995. (ALJX 4, 5; Tr. 553-555).

I next address United's request for sanctions dated August 17, 1995. On that date, United prepared a response to the plaintiff's motion to quash certain subpoenas. United argues that the Plaintiff did not understand my earlier ruling regarding the motion to quash, or essentially disregarded it, therefore causing United to incur attorneys' fees and expenses in the preparation of a memorandum in opposition to OFCCP's motion to quash. (ALJX 5). United submitted an affidavit at the hearing itemizing its costs for attorneys' fees and expenses totalling $1,111.50. (ALJX 6, 11).

OFCCP acknowledged at the hearing that there was some misunderstanding surrounding its motion to quash the subpoenas and my order pertaining to that motion. It was noted that there appeared to be some conflict between Fed. R. Civ. P. 45 and the OFCCP regulation pertaining to witnesses, 41 C.F.R. § 60-30.17(c). Plaintiff assured me that it was this misunderstanding that caused OFCCP to file the second motion to quash and was not an intentional disregard of my previous order. (Tr. 557-558, 561). Notwithstanding United's argument that my order made it clear that Fed. R. Civ. P. 45 was to control, I accept OFCCP's position as reasonable and deny the Defendant's request for monetary sanctions relating to its memorandum in opposition to the Plaintiff's second motion to quash. (Tr. 559-560).

The third unresolved request for sanctions pertains to attorneys' fees and expenses associated with the preparation and filing of OFCCP's motion to compel production of documents and memorandum in support thereof dated July 19, 1995. (ALJX 12). OFCCP filed a post-hearing declaration of counsel dated September 22, 1995 in which attorneys' fees and expenses totalling $292.30 are itemized with respect to the costs incurred in preparing and filing this motion and memorandum.[5] I provided in the order of July 20, 1995 that United's counsel would be allowed to respond to this request for sanctions at the hearing. (ALJX 13).

Counsel for United and OFCCP respectively presented substantial argumentation regarding this matter at the hearing. (Tr. 567-590). Without intending to diminish the importance of these discovery matters, United's arguments essentially are that it acted in a reasonable manner in attempting to comply with the voluminous discovery requests of the government and experienced considerable difficulty in obtaining the requested documents, not only because of the breadth of the requests, but due to the fact that many of the documents were scattered over various offices of this international corporation. United also questioned the need to produce some of the documentation relating to Pan Am pilots other than Mr. Pyles especially since the Plaintiff did not use this evidence at the hearing. OFCCP responded that it was reasonable to request the documents in question regardless of whether they were used at the trial and that United's continued failure to produce the requested information was prejudicial to the government's position and should be sanctioned.

United also requests additional sanctions against OFCCP for attorneys' fees and expenses incurred in the preparation of the filing of its memorandum in response to the Plaintiff's objection to affidavits certifying its efforts to locate documents dated August 28, 1995. (ALJX 8). This document also related to OFCCP's request for the production of documents pertaining to the medical and personnel files of the Pan Am pilots who apparently were to be hired by United under its contract to purchase certain routes of Pan Am. It also relates to the affidavits required of United pertaining to its attempts to comply with my order of August 15, 1995.

United again refers to the voluminous documentation in question and the question of the relevance of such evidence. The Defendant maintains that much of OFCCP's problems in obtaining documentation were due to the government's failure to pursue discovery in a timely fashion. United therefore argues that OFCCP's request for sanctions relating to these discovery matters are unreasonable, vexatious and harassing and that the Plaintiff should be sanctioned for attorneys' fees and costs incurred by United in responding to OFCCP's objection to the affidavits of United's custodians of the records. Pursuant to my direction at the hearing, United filed an

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[5]A copy of this notice of filing of declaration is separated from the pleadings in this case and is hereby admitted in evidence as Administrative Law Judge Exhibit (ALJX) 15.

affidavit of counsel on September 20, 1995 which itemizes attorneys' fees and costs for the work on the memorandum in question totalling $1,002.15.[6]

Much could be written about the discovery actions in this proceeding. Suffice it to say, such efforts were zealous and at times the principal parties seemed to dwell, or seek unnecessary intervention, on matters of questionable relevance and importance. Notwithstanding, I cannot conclude that the actions of the parties, particularly those remaining in question, were unreasonable or arbitrary. This is particularly true considering the difficulty often confronted a plaintiff in meeting the burden of proving employment discrimination and the need for an innocent employer to present a vigorous defense against such a claim. I therefore deny both of the requests for sanctions of OFCCP and United for the attorneys' fees and costs associated with the Plaintiff's motion to compel the production of documents and the Defendant's memorandum in response to Plaintiff's affidavits regarding its efforts to locate documents.

RECOMMENDED ORDER

For the above-stated reasons, IT IS HEREBY RECOMMENDED that OFCCP's complaint against United Airlines, Inc. for violating Section 503 of the Rehabilitation Act dated October 8, 1993 be dismissed. IT IS FURTHER RECOMMENDED that the requests for sanctions by OFCCP and United for attorneys' fees and expenses associated for the above-mentioned discovery actions be denied.

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DONALD W. MOSSER
Administrative Law Judge

[6]A copy of this affidavit is separated from the pleadings and is hereby admitted in evidence as Administrative Law Judge Exhibit (ALJX) 16.